UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C. 20460

IN THE MATTER OF	:	
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DADE COUNTY SCHOOLS	:	**DKT. NO. RCRA-91-11-R**
1450 N.E. 2nd Avenue	:	
Miami, Florida 33132	:	Judge Greene
	:	
	:	
Respondent	:	
	:	
	:	

ORDER
GRANTING MOTION FOR "ACCELERATED DECISION"
AS TO RESPONDENT'S LIABILITY

This matter arises under Section 3008(a)(1),(3) and (g) of the Resource Conservation and Recovery Act ("RCRA" or "the Act"), 42 U.S.C. § 6928(a)(1),(3), and (g), which provides inter alia for the issuance of compliance orders and the assessment of civil penalties for violations of that portion of the Act entitled **Subchapter III - Hazardous Waste Management.** The complaint charges that respondent failed to determine whether certain wastes were prohibited from being disposed of in a landfill or other land disposal or storage area ("restricted from land disposal," or "land disposal restricted"[1]) before such wastes were shipped from respondent's

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[1] The term "land disposal" as defined at 40 CFR § 268.2(c) means " . . . . placement in or on the land and includes, but is not limited to, placement in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, underground mine or cave, or placement in a concrete vault or bunker intended for disposal purposes."

facility, in violation of 40 C.F.R. § 268.7(a). Complainant asserts that no material facts remain at issue and that complainant is entitled to judgment as a matter of law.[2] Respondent urges in response to the motion that material facts as to whether respondent is liable do remain at issue, and that the motion should be denied.[3]

The government of Dade County, Florida, operates a central maintenance facility at 2925 N. W. 41st Street, Miami, Florida, which purchases chemicals for use in the maintenance of Dade County schools[4]. During the period in question, respondent had been storing at the facility several hundred pounds of unused technical grade 79% sodium pentachlorophenate, an algicide which respondent had apparently purchased for the air conditioning cooling towers of Dade County schools. It is not clear from the record whether any of the material was actually used[5]. Respondent learned that problems had arisen in other areas in connection with the use of

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[2] Complainant's **Motion for Accelerated Decision** of December 16, 1992.

[3] **School Board's Responsive Memorandum in Opposition to Complainant's Motion for Accelerated Decision, January 17, 1993**

[4] **Complainant's Exhibit D Attached to Motion for Accelerated Decision [CX D]**, Question No. 2 and Answer.

[5] It appears that about 700 pounds in bead form were purchased and that about 50 pounds may have been used. Respondent's employee testified on deposition that ". . . . the drums that I opened and examined all the bags were sealed . . . [T]he guy who had been around there the longest said they'd never used any of that but one bag." **CX E**, at 62.

sodium pentachlorophenate[6], and, at some later point, its use was banned by the State of Florida.[7]

Respondent made inquiries about disposing of the material. Its Safety Department contracted with Petroleum Management, Inc. (PMI) of Davie, Florida, by purchase order dated January 8, 1990, to test, transport, and dispose of the containers of sodium pentachlorophenate, together with about 84 containers of other materials, at a cost of $50,000.[8],[9] PMI, whom respondent believed was licensed to dispose of certain waste materials[10], was given an inventory prepared by respondent which specified that six and a half drums of the total number to be removed from the facility contained sodium pentachlorophenate. The inventory noted that sodium pentachlorophenate is "on [the] extremely hazardous list"[11] In addition, the employee who prepared the inventory says he told PMI "verbally on more than one occasion" that the material was

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[6] **CX E**, at 10-11. Respondent's employee stated in a deposition that ". . . . it was being banned in a lot of places . . . and I was aware of this and I did not use it because I knew of that." At the time the sodium pentachlorophenate was purchased, however (before this individual came to respondent), it was commonly used as an algicide. **Id.** at 10.

[7] **Complainant's Exhibit [CX] D** with Motion for Accelerated Decision.

[8] **CX E**, Deposition of Mr. Earle Smith, at 11.

[9] **CX E**, at 51; **School Board's Exhibit [RX]** 1.

[10] **CX E** at 17.

[11] **CX L.** The handwritten entry on the inventory reads " 'GST Bead'algaecide 79% sodium pentachlorophenate - 6 1/2 x 100 # drums | NOT IN USE | on extremely hazardous list."

hazardous[12].

PMI subcontracted with Resource Recovery of America, Inc. [RROA] to perform the contract with respect to all of the containers. When RROA arrived on September 12, 1990, to pick up the containers, a Uniform Hazardous Waste Manifest ("manifest") was presented to one of respondent's employees for signature. The manifest indicated that there were six containers of sodium pentachlorophenate and indicated further that they contained "N/R," or non-regulated, material. The employee who signed the manifest for respondent knew nothing about the containers, and did not read the manifest. The record does not disclose who had prepared the manifest for RROA -- whether employees of PMI or RROA. The record does show that RROA had been given a profile, prepared by PMI, of the items to be picked up. The profile contained various inaccuracies.[13] For example, it failed to indicate that the contents of the six containers were hazardous, and, further, did not show the contents as unused sodium pentachlorophenate restricted from land disposal as F027 waste. The profile was signed by another of respondent's employees, who assumed that the information on it was accurate.[14]

RROA consigned the six containers to a Rollins Environmental Services facility in Baton Rouge, Louisiana, without determining

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[12] **CX E** at 59.

[13] **CX E** at 36-41.

[14] **CX C**, Generator's Waste Material Profile Sheet. See complainant's **Brief in Support of Motion for Accelerated Decision**, at 4; **CX F**, Deposition of Mr. John Doerr, at 13-15.

whether the material was land disposal restricted, and apparently without notification that the material was F027 hazardous waste. 40 C.F.R. § 268.7(a)(1)].[15],[16]

The complaint states that respondent ". . . . manifested six (6) drums of unused sodium pentachlorophenate . . . to Resource Recovery of America (RROA) in Mulberry, Florida," on September 12, 1990, "without identifying it as a F027 listed hazardous waste."[17] The complaint charges specifically that respondent violated 40 CFR § 268.7(a) ". . . . by failing to determine, as required by 40 C.F.R. § 268(a), that the unused formulation of sodium pentachlorophenate that they manifested to RROA on that date was a land disposal restricted hazardous waste."[18] A civil penalty of $25,000 is sought.

40 C.F.R. § 268.7(a) [1990] provides as follows:

> § 268.7 **Waste analysis**
>
> (a) Except as specified in § 268.32 or section 268.43 of the part, the generator must test his waste, or test an extract

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[15] RROA was charged in a separate proceeding with failing to comply with the requirements of 40 C.F.R. § 268.7(a) in not determining that the unused formulation of sodium pentachlorophenate manifested to Rollins Environmental Services on September 12, 1990, was a land disposal restricted hazardous waste. The complaint against RROA was later consolidated with this matter pursuant to motion. Respondent RROA subsequently signed a consent agreement, which became effective on January 23, 1993, in settlement of the charges.

[16] The record does not show whether or how Rollins Environmental Services disposed of the containers.

[17] **Complaint** at 3, ¶ 8.

[18] **Complaint** at 3, ¶ 10.

> developed using the test method described in Appendix I of this part, or use knowledge of the waste, to determine if the waste is restricted from land disposal under this part.

Complainant calls attention to the fact that respondent was charged only with failure to determine whether the waste was land disposal restricted, and that respondent was not charged -- but could have been charged[19] -- with failing to notify the treatment or storage facility in writing of the appropriate treatment standards as set forth in the regulations at 40 C.F.R. § 268.7(a)(1).[20] Nevertheless, at several points in its motion and initial supporting brief, complainant appears to argue that respondent **failed to notify** RROA that the waste was land disposal restricted.[21] Since respondent was not charged by complainant with failure to notify anyone of anything, allusions to such failure are taken only as adding weight to the assertion that no material facts remain at issue with respect to the specific charge.

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[19] **Complainant's Supplemental Brief in Support of Motion for an Accelerated Decision**, January 29, 1993, at 5-6.

[20] The notification provisions of 40 C.F.R. § 268.7(a)(1)(i)-(iv) require written notice to the treating or storing facility of the appropriate treatment standards as set forth in Subpart D of Part 268 and any applicable prohibition levels set out in § 268.32 or RCRA § 3004(d). The notice must also include (i) the EPA Hazardous Waste Number; (ii) the corresponding treatment standards; (iii) the manifest number associated with the shipment of waste; and (iv) waste analysis data where available. But respondent was not charged with a violation of these notification provisions, as complainant points out.

[21] **Complainant's Motion for Accelerated Decision at 4, ¶ (j); complainant's Brief in Support of Motion for An Accelerated Decision**, December 16, 1992, at 11-12.

In its answer to the complaint, respondent denied that it failed to identify the drums as an F027 listed hazardous waste, and denied the specific charge -- i. e. that it had failed to determine as required by 40 C.F.R. § 268.7(a) "that unused formulation of sodium pentachlorophenate that was manifested to RROA on that date was a land disposal restricted hazardous waste." Respondent admitted that it had not specifically marked the drums as F027 listed hazardous waste, but stated that "the chemical was clearly marked as sodium pentachlorophenate and respondent specifically advised Petroleum Management Inc., which had subcontracted the removal to RROA, that the chemical was 'on the extremely hazardous' list."[22] Respondent also denied that a penalty is appropriate for this "one time occurrence," but did not dispute the seriousness of the violation.[23]

Respondent's defense is that its contractor had been informed both orally and on the inventory of the material to be shipped that six and one half drums contained sodium pentachlorophenate, which was "probably very hazardous."[24] Respondent further contends that it had fulfilled its obligation

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[22] Respondent's **Answer to the Complaint and Compliance Order, paragraph 10 at 3.**

[23] **Id.**

[24] **Id** at 20; **CX L**, respondent's inventory of items to be shipped, notes that the sodium pentacholorophenate is "NOT IN USE" and is "on extremely hazardous list."

because it was the responsibility of the contractor to test the material and dispose of it properly[25]. Further, respondent argues, it is clear that PMI had prepared the profile which failed to show the sodium pentachlorophenate as F027 hazardous land disposal restricted waste.

The charge in the complaint goes only to respondent's alleged failure to determine whether the material was restricted from land disposal.[26] On brief, respondent admits that ". . . .the School Board did not reach any conclusions as to whether the sodium pentachlorophenate was restricted from land disposal," stating that such determination was "left up to PMI, which had been contracted to legally test, transport and dispose of" the sodium pentachlorophenate because "[T]he School Board is not equipped to personally test its waste materials . . . ."[27]. Respondent argues that this duty may be delegated to its contractor, who was told what the material was and that it was hazardous.

While respondent argues its points forcefully and presents a sympathetic case, it is nonetheless apparent that 40 CFR § 268.7(a) requires respondent to test -- or use knowledge of the waste to

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[25] See **RX 1** and **2**, attached to **School Board's Responsive Memorandum in Opposition to Complainant's Motion for Accelerated Decision**, January 15, 1993.

[26] Complainant's **Supplemental Brief in Support of Motion for Accelerated Decision**, February 3, 1993, at 5-6.

[27] **School Board's Responsive Memorandum In Opposition To Complainant's Motion for Accelerated Decision**, at 6, citing **RX 1** (School Board's Purchase Order of January 8, 1990), and **CX D**, School Board's Response to EPA Information Request.

determine -- whether the waste is restricted from land disposal. A general awareness that sodium pentachlorophenate waste is hazardous, even when coupled with specific warnings to the contractor, must be held to be inadequate compliance with the specific requirement of 40 C.F.R. § 268.7(a).

Compliance with the regulations is the responsibility of the generator, which respondent unquestionably is in this instance[28]. The contents of the six and a half containers were not determined to be land restricted according to the requirements of 40 C.F.R. § 268.7(a)] even though respondent told its contractor that the material was hazardous. Respondent was charged with failure to determine whether the waste could be land disposed. Respondent did not make that determination -- and neither did its contractor. Complainant in its brief correctly asserts that respondent may not contract away responsibility for compliance with the regulations[29]. It also seems clear from the evidence attached to the briefs that respondent was not well served by its contractor.[30]

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[28] The term "generator" is defined at 40 C.F.R. § 10 as follows:

> **Generator** means any person, by site, whose act or process produces hazardous waste identified or listed in Part 261 of this chapter or whose act first causes a hazardous waste to become subjct to regulation. [Emphasis original]

[29] Complainant's **Brief in Support of Motion for Accelerated Decision**, at 12.

[30] Of course, the contractor's responsibility to carry out the terms of the contract is a separate question from respondent's responsibility to observe the hazardous waste regulations.

Certain of respondent's arguments, including the matter of the State of Florida proceeding in connection with the handling of the sodium pentachlorophenate, go directly or indirectly to the amount of the penalty, if any, to be imposed for the violation found here. These arguments will be considered further if the penalty issue is not the subject of a rapid agreed disposition between the parties. The Order below requires the parties to meet to attempt to settle the penalty issue, and it is anticipated that respondent's efforts -- which, but for a failure on the part of its contractor, would appear to have been more than sufficient to carry out its responsibility pursuant to the regulations to deal responsibly with waste which it knew to be hazardous -- should be a major consideration in the settlement effort. It is antitipated further that the penalty, if any, will be minimal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a "generator," as that term is defined at 40 C.F.R. § 260.10.

2. Respondent is a "person," as defined at 42 U.S.C. § 6903(15);[31]

3. Respondent did not test or use knowledge of the waste to determine whether such waste was land disposal restricted, as required by 40 C.F.R. § 268.7(a). Accordingly, respondent violated that regulation. The responsibility to comply with the regulation

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[31] **Answer to the Complaint and Compliance Order**, June 27, 1991.

may not be contracted away, although it appears from this record that, but for the failure of the contractor in this instance, respondent's actions would have led to compliance with 40 C.F.R. § 268.7(a). Respondent made good faith attempts to comply.

4. The State of Florida proceeding in connection with respondent's handling of the same sodium pentachlorophenate does not bar this proceeding.[32]

5. No material facts remain at issue herein with respect to liability; complainant is entitled to judgment as to liability as a matter of law.

6. The issue of whether the finding of liability herein should generate a monetary civil penalty, and, if so, in what amount, remains to be decided.

7. Notice of this action was given to the State of Florida, RCRA § 3008(a)(2); 42 U.S.C. § 6928(a)(2).[33]

ORDER

It is hereby **ORDERED** that respondent shall be, and is hereby found liable for a violation of 40 C.F.R. § 268.7(a) as alleged in the complaint in connection with the shipment of sodium

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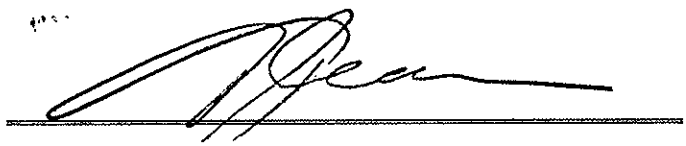
[32] Respondent includes an argument relating to the State action in its brief on the question of liability, but, at a later point ". . . . does not argue that EPA can impose its own penalties in addition to those levied by the state," and urges the State's action in mitigation of the proposed penalty. **School Board's Responsive Memorandum in Opposition to Complainant's Motion for Accelerated Decision**, at 8-9, 19.

[33] **Complaint**, at 1, ¶ 2.

pentachlorophenate on September 12, 1990. Accordingly, complainant's motion for judgment is granted as to liability. And it is **FURTHER ORDERED** that complainant's motion is denied as to the penalty sought.

It is **FURTHER ORDERED** that respondent shall comply with the terms of the compliance order issued with the complaint herein.

And it is **FURTHER ORDERED** that the parties shall meet to confer regarding settlement of the remaining issue herein, and shall report upon the status of their effort during the week ending September 24, 1993.



J. F. Greene
Administrative Law Judge

Washington, D. C.
August 27, 1993

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for complainant and counsel for respondent.

Shirley Smith
Legal Staff Assistant
to Judge J. F. Greene

NAME OF RESPONDENT: DADE COUNTY SCHOOLS
DOCKET NUMBER: RCRA-91-11-R

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